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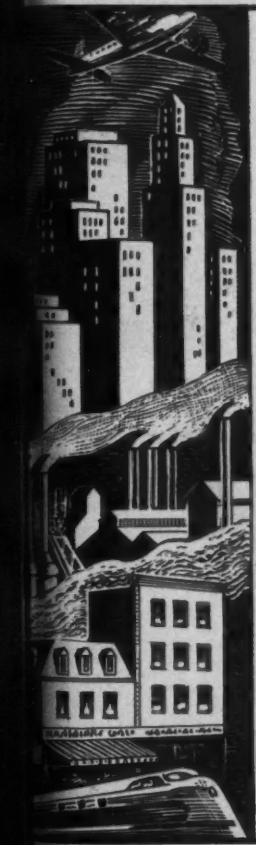

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AUGUST—SEPTEMBER 1957

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Recent Decisions

V. G.

Good statutory representation provides complete freedom from concern about a missed or delayed notice of process served on the corporation's statutory agent or at its statutory office.

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what constitutes doing business

Taxation of Contractors in Federal Areas
State Contractors' Licenses

IN *Leslie Miller, Inc. v. State of Arkansas,* 77 S. Ct. 257, decided December 17, 1956, the Supreme Court of the United States, reversing a decision of the Supreme Court of Arkansas, reported at 281 S. W. 2d 946, held that contractors could not be required to obtain state contractors' licenses when constructing facilities in fulfilling a Government contract in a Federal area over which the Government had not accepted jurisdiction. Upon the appeal is this case, one of the contractors as well as the United States, contended that the Arkansas law providing for the state license interfered with the Federal Government's power to select contractors and schedule construction and was in conflict with the federal law regulating procurement. The Supreme Court of the United States found "a conflict between this license requirement which Arkansas places on a Federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of persons and companies contracting with the Federal Government. Subjecting a federal contractor to the Arkansas contractor license requirements would give the State licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder."

This conclusion is somewhat at variance with a number of rulings at the state level relating to the necessity of procuring state contractors' licenses where work is to be performed within Federal areas,[1] although in general accord with conclusion reached in other state rulings.[2]

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[1] *North Carolina:* State contractor's license ruled not required for work done in area over which United States had exclusive jurisdiction. (Attorney General's Opinions, CCH North Carolina—State Tax Reporter—¶¶ 30-444.10, 30-445.30) *Nevada:* State contractor's license held not required for bid submitted for construction of state highway with state funds in Federal recreational area on Federal land. (Attorney General's Opinion, CCH Nevada STR ¶ 30-658.20) *Virginia:* State contractors' licenses regarded as not required to perform building construction contract in navy yard. (Ruling of Department of Taxation, CCH Virginia STR, ¶ 30-126.02)

[2] *Utah:* State contractor's license may be required to perform work on property owned by the Federal Government, even though work is done entirely under a contract with the Federal Government. (CCH Utah STR, ¶ 30-655.35) *Virginia:* The Supreme Court of Appeals has held a corporation subject to a contractor's license where it contracted with the Federal Government to construct a post office in Lynchburg, subletting the work to other contractors. (*Ralph Solitt & Sons Construction Co. v. Commonwealth,* 161 Va. 854, 172 S. E. 290; appeal dismissed for want of a substantial Federal question, 292 U. S. 599, 54 S. Ct. 632. CCH Virginia STR, ¶ 30-125.10)

domestic corporations

DELAWARE

Indemnification denied officer and director where litigation which was defended did not involve him in his official capacity.

In *Sorensen v. The Overland Corporation,* 142 F. Supp. 354 (The Corporation Journal, December 1956—January 1957, page 284), the United States District Court, District of Delaware, held that indemnification was to be denied an officer and director where the litigation which was defended involved him in his personal and not his official capacity, under an employment agreement entered into before he became an officer and director.

Upon appeal, the United States Court of Appeals, Third Circuit, has affirmed the judgment of the District Court.

Sorensen v. The Overland Corporation, 242 F. 2d 70. James R. Morford (Morford & Bennethum, on the brief), of Wilmington, for appellant. Edwin D. Steel, Jr., (William S. Megonigal, Jr., on the brief), of Wilmington, for appellee.

Stockholder ruled not estopped to seek court action directing the calling of an annual meeting, where she deliberately refrained from being present at originally called meeting where quorum was lacking, due to her absence.

Petitioner, individually and as executrix of her husband's estate, sought a summary order under Section 224, G. C. L., for the holding of a stockholders' meeting to elect directors. At the time fixed for determining those qualified to vote at the annual meeting of stockholders called for April 18, 1956, the corporation had outstanding 1,000 shares of voting stock; 500 being in the name of J. E. Burden, 300 in the name of petitioner's husband and the remaining 200 in the name of the petitioner. The husband had died on March 31, 1956, but letters were not granted to petitioner as his executrix until May 7, 1956. Thus, no one was qualified to represent those shares at the meeting called for April 18, 1956. On the day prior to the meeting date, petitioner's attorney notified the corporation that petitioner would not be present or represented and asked for a month's adjournment. The "meeting" was held, but since only 500 shares were represented, being less than a majority, there was no quorum present. The annual meeting was, therefore, adjourned without any vote for the election of directors. After the adjournment, petitioner made numerous demands upon the corporation to call a stockholders' meeting for the election of directors. No annual meeting was called, and this action was commenced February 18, 1957, seeking such a meeting.

"The sole substantial basis for the corporation's argument that the petitioner is estopped to seek the relief requested," said the Chancellor, "arises from the contention that she deliberately failed to attend the annual meeting in order to prevent an election of directors at that time. Otherwise stated, the corporation contends that the petitioner, knowing that she would not be able to vote the 300 shares in her husband's estate because she had not yet qualified as executrix, asbtained from participation in order to prevent a quorum and the consequent election of directors."

The Chancellor concluded that the defense of estoppel was not available in this case to the corporation and ruled that petitioner was entitled to an order directing the corporation forthwith to call a stockholders' meeting on the shortest possible legal notice for the purpose of electing directors to serve at least until the next annual election.

In the Matter of Pioneer Drilling Company, Inc., 130 A. 2d 559. William H. Bennethum of Morford & Bennethum, of Wilmington, for petitioner. Hugh M. Morris, Alexander L. Nichols, Andrew B. Kirkpatrick, Jr., of Morris, Steel, Nichols & Arsht of Wilmington; Houston G. Williams and W. J. Wehrli of Casper, Wyoming, for Pioneer Drilling Company, Inc.

NEW YORK

Where secretary-treasurer alone managed corporate affairs, Court of Appeals upholds his implied authority to bring suit on behalf of corporation.

"In 1938, Isidor Rothman and William Schneider organized the plaintiff corporation to manufacture and sell semi-precious stone rings. Each of them, along with his respective wife, owned 50% of the corporate stock, and all four were directors. Rothman was president and Schneider, secretary-treasurer." The question presented to the Court of Appeals of New York was whether, in light of the particular facts and circumstances, the secretary-treasurer had authority to institute and prosecute this action on behalf of his corporation against a former salesman and another for converting a portion of its assets.

No directors' meeting had been held and the corporate by-laws had been disregarded in the management of the company over a period of years, during which Schneider, who instituted the suit, alone ran the company. The court noted that he did not have express authority to institute litigation in the corporation's name; the by-laws gave him no such power and the board of directors, not requested to pass upon the matter, took no action. However, the court observed that the evidence was clear and strong that he did have implied authority to proceed against the defendants. Upholding the maintenance of the suit, the Court of Appeals observed that "where a secretary-treasurer has alone been running the company, alone conducting its affairs generally without intervention or direction from board of directors or president, there is no reason, in law or practice, why he should not be able to institute an action against an outsider, on the corporation's behalf, to preserve its existence or otherwise protect its interests."

Rothman & Schneider, Inc. v. Beckerman et al., 161 N. Y. S. 2d 118, 2 N. Y 2d 493. Milton Kail of New York City for appellants. Herbert Cohen of New York City, for respondent.

PENNSYLVANIA

Upon dissolution, approved by shareholders, directors, having agreed in writing to sell principal corporate asset, could reject higher subsequent offers on behalf of undisclosed principal.

After the stockholders had voted to dissolve their corporation, liquidate its assets and make distribution, the directors were unable to secure an acceptable offer. Sealed bids were then solicited and the highest bid was accepted, subject to stockholder ratification. Before a special stockholders' meeting to ratify was held, a higher offer by an attorney for an undisclosed principal was received. The amount was increased at the stockholders' meeting, appellant, a stockholder, subsequently being revealed as the undisclosed principal. The stockholders voted to accept the smaller bid, which had been submitted, as the stockholders knew, by the president and two other persons.

The Supreme Court of Pennsylvania affirmed a decree in favor of the directors, the lower court having specifically found no evidence of fraud or attempt by the president to influence the board of directors. The higher court rejected appellant's contention that "reasonably prudent business men" would have accepted his higher offer under all of the facts surrounding the transaction.

Scott v. Stanton Heights Corporation et al., 131 A. 2d 113. John A. Metz, Jr., Metz, McClure & MacAlister of Pittsburgh, for appellant. V. C. Short and John J. Dougherty of Pittsburgh, for Stanton Heights Corp. Walter T. Mc Gough, Leonard L. Scheinholtz, and Reed, Smith, Shaw & McClay of Pittsburgh, for Totten, Dodds & Sauers.

foreign corporations

CALIFORNIA

Service of process upheld where made upon local representative who was granted exclusive territory by foreign corporation.

In the trial court, one of the defendants, an Illinois corporation, appeared specially and moved to quash service of summons upon it. The company had neither a place of business nor a bank account in California. It sold boilers through a California representative on commission. Service was made upon this representative in one of five combined suits, and upon this representative's sales engineer in the other four suits, as the agents for the company. The suits grew out of a boiler explosion at an industrial plant in California. The representative was given exclusive franchise for the sale of the company's products within a designated area.

The District Court of Appeal, First District Division 1, affirmed a judgment of the trial court holding that the

corporation was amenable to service of process.

Eclipse Fuel Engineering Company v. Superior Court, City and County of San Francisco, 307 P. 2d 739. Lamb, Hoge & Killion, of San Francisco, for petitioners. Boccardo, Blum & Lull of San Jose, for real parties in interest.

COLORADO

Service upon corporation set aside where made upon a district representative and upon a service engineer, both covering wide territories which included state.

An Illinois corporation, the third party defendant, moved to quash service of process upon it, on the grounds that it was not engaged in business in Colorado and that the persons served were not agents for service of process. This corporation had purchased the business and assumed the obligations of a corporation which became indebted to the plaintiff prior to the time the Illinois corporation was organized. That company employed district representatives and service engineers. One of the two persons upon whom service was attempted was a district representative whose territory consisted of Colorado and a number of nearby states who was the company's only representative in Colorado during the time in question. He advised and counseled distributors in the promotion of sales and had no authority to sell the company's products and generally worked through the distributor. A very substantial part of his time was spent outside Colorado. Service was also made on a service engineer, who also covered a wide range of territory, including Colorado, whose duties were to train and counsel distributors on problems of maintenance, repair and upkeep of the equipment the company sold.

The Colorado Supreme Court affirmed a judgment of the trial court determining that the Illinois corporation was not amenable to process, sustaining the motion to quash the service, concluding that the company, under all the circumstances shown, was not so continuously and substantially operating in Colorado as to be "doing business" there.

The Colorado Builders' Supply Company v. The Hinman Brothers Construction Company et al., 304 P. 2d 892. Fairfield & Woods, James A. Woods and Charles J. Beise, of Denver, for plaintiff in error. Kenneth W. Robinson, Robert D. Charlton and Richard L. Schrepferman, of Denver, for defendant in error LeTourneau-Westinghouse Company. Arber, Swain & Johnson and Timothy W. Swain, of Peoria, Ill., of counsel, for defendant in error LeTourneau-Westinghouse Company.

NEW YORK

Director of Delaware corporation granted right to inspect corporate books and records related to New York activities; inspection at office out of state directed upon appeal.

A director of a Delaware corporation filed an application in the New York Supreme Court, New York County, Special Term, Part I, for an inspection of his corporation's books and records. In granting the petition, the court noted that "petitioner's statement that the main office of the corporation is in New York City, that a substantial portion of its books and records are in that main

office, and that all meetings of the board since he became a director have been held there, has not been challenged." It was also noted that there was no statute in New York dealing with the right of a director of a corporation, domestic or foreign, to inspect its books.

The court concluded that jurisdiction existed, under the circumstances shown, to compel an inspection of those books and records which have been regularly kept and maintained in New York. It stipulated that the nature of the relief granted did not go beyond the company's own activities in the state. Also, that it would not enjoin an alleged contemplated removal of books and records from the state if that was necessary in connection with the physical removal of the company's main office to another state, that being truly a matter of internal management with which the courts of the state may not interfere. It was also directed that the order should provide that, if such removal were effected, all books and records so removed should be brought back into the state at the appointed time and place for the purpose of the inspection.

Answering an objection that the petitioner was seeking the examination solely for his personal benefit, to harass the corporation and to obtain evidence for use in a pending action brought by it against him, the court remarked: "The rule has been firmly established in this state that, regardless of motive, a director—as distinguished from a stockholder, who must show good faith—is entitled to an inspection so long as he is a director," in the absence of a showing that the law in the state of incorporation is contrary to that of New York.

Newmark v. C. & C. Super Corporation, 159 N. Y. S. 2d 77. Gabriel Galef and Victor Jacobs (William M. Ivler, of counsel), of New York City for petitioner. Satterlee, Warfield & Stephens (F. W. H. Adams, Joseph R. Crowley and Robert C. Hubbard, of counsel), of New York City, for respondent.

Upon appeal, the Supreme Court, Appellate Division, First Department, concluded: "Under the special circumstances existing here, the petitioner should not be limited to an examination of the books and records physically located within the jurisdiction, but in addition may inspect those regularly kept in the office maintained without the state. We, therefore, modify the order of Special Term only to the extent of requiring the addition of another decretal paragraph to provide that books regularly kept in an office maintained out-of-state need not be brought to the New York office but may be examined in the office maintained without the state. The petitioner must bear the expenses attendant upon the examination in both places."

Nemark v. C. & C. Super Corporation, 160 N. Y. S. 2d 936. W. M. Ivler of New York City, for petitioner-respondent-appellant J. R. Crowley of New York City, for respondent-appellant-respondent.

Court refuses to take jurisdiction of suit seeking to compel redemption of stock of foreign corporation.

Plaintiff corporation, a preferred stockholder in defendant Florida corporation, sued to compel the redemption of its stock and payment of cumulative dividends thereon. Defendant appeared specially and moved to vacate the service of the summons and to dismiss the complaint. The motion was based on two grounds: (1) that defendant was a foreign corporation not doing business in New York and therefore that the court had no jurisdiction, and (2) that the action involved

the regulation and management of the internal affairs of the corporation, and hence such issues were properly to be determined in the Florida courts and the New York court should decline jurisdiction.

The New York Supreme Court, Monroe County, ruling in favor of the defendant, remarked: "The present action seems to fall clearly within the rule applying to actions involving the internal affairs of a corporation. Defendant's motion to dismiss the complaint should therefore be granted. This disposition of the matter makes it unnecessary to pass upon that portion of the motion in which the defendant seeks to vacate the service of the summons upon the ground that it is not doing business within the State of New York. The rule requiring the dismissal of the complaint in this action would apply even though the defendant was doing business in this state."

Lakeman Realty Corporation v. Sunny Isles Ocean Beach Company, 160 N. Y. S. 2d 947. John C. Weld of Rochester, for plaintiff. Whitbeck & Holloran and Walter J. Holloran of Rochester, for defendant.

Service of process on agent for process designated by defendant under Federal Motor Carrier Act regarded as consent to the jurisdiction in personam by the proper court.

Service of process, which defendant Florida corporation, not qualified in New York, sought to have vacated and set aside, was made upon a person designated pursuant to the Federal Motor Carrier Act (49 U. S. Code, Sec. 321) as one upon whom process could be served in the State of New York. Defendant asserted that any service other than as specified under Section 229 of the Civil Practice Act was invalid.

In upholding the service, the New York Supreme Court, Special Term, Kings County, Part I, applied the judgment of the Appellate Division, Second Department, in *Esperti v. Cardinale Trucking Corporation*, 263 App. Div. 46, where service was likewise made under the Motor Carrier Act and where the Court noted that "it is fundamental that jurisdiction over the person of a defendant may be acquired by consent. By designating the agent upon whom process was to be served in this State, the defendant consented to the jurisdiction in personam by the proper court." The motion to vacate and set aside service of summons was denied.

Bullock v. Tamiami Trail Tours, Inc., 137 New York Law Journal, No. 61, p. 10.

Corporation not subjecting itself to jurisdiction ruled not entitled to avail itself of the benefits of Section 61-b, G. C. L., relating to posting of security.

This was a motion in a stockholders' derivative suit for an order, pursuant to Sec. 61-b of the General Corporation Law, directing the plaintiff to furnish security in the amount of reasonable expenses, including attorneys' fees, which might be incurred by the corporate defendant, and for a stay pending the furnishing of such security. The corporate defendant had not appeared generally in the


PENN-TEXAS

_____part of the room in CT's New York office where proxies involved in the recent dispute between two stockholders' groups of the Penn-Texas Corporation were sorted, examined and tabulated. At each table an examiner from each of the opposing groups plus a member of the CT staff (handling the final tabulation).

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suit but had appeared specially through motion, to vacate, quash and set aside the attempted service upon it of process. The ground of the special appearance was that the corporation was a foreign entity, not doing business in New York.

The New York Supreme Court, Special Term, Kings County, Part I, concluded that, as the defendant had not subjected itself to the jurisdiction of the court and no action was pending, the corporate defendant was not entitled to avail itself to the benefits of Sec. 61-b of the General Corporation Law, and that a determination of the defendant's motion for the posting of security would be held in abeyance pending the receipt of a referee's report relative to the corporate defendant's business and activities in the state.

Gilbert v. Case et al., 159 N. Y. S. 2d 898. Robert L. Bobrick of New York City, for Plaintiff. White & Case of New York City, for defendant Glen Alden Corp., appearing specially.

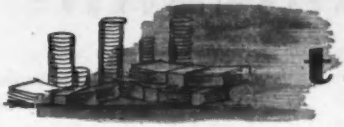
PENNSYLVANIA

Sales to exclusive local distributor and periodical visits of factory representative of seller to give servicing instruction on equipment sold by defendant seller to distributor, ruled insufficient to uphold service of process.

In a tort action, involving diversity of citizenship, plaintiff attempted to make service upon the named corporate defendant by having process served upon the Secretary of the Commonwealth under Section 1011, subd. B of the Pennsylvania Business Corporation Law of 1933, as amended. That defendant, not registered to do business in Pennsylvania, moved to dismiss the action as to it, contending that no valid service of process had been made on it, as it had not done and was not doing business in Pennsylvania. This company sold and shipped its product into the state only to its exclusive distributor in Pennsylvania, and had no office or place of business, solicitors, bank account or business records there. The only employee who entered Pennsylvania was a factory representative whose office was in New York. He periodically visited the place of business of the distributor to instruct the distributor's employees with respect to servicing and maintaining tools manufactured by the named defendant. Occasionally, while in Pennsylvania, he made minor adjustments and repairs to that defendant's products.

The United States District Court, E. D., Pennsylvania, granted the motion to dismiss the action, deciding that the defendant had not been doing business in Pennsylvania and was not amenable to service there.

Florio et al. v. Powder-Power Tool Corp., 148 F. Supp. 843. Freedman, Landy & Lorry of Philadelphia, for plaintiff. Morris Passon of Philadelphia, for General Equipment Co. John J. McDevitt III of Philadelphia, for Powder-Power Tool Corp.



taxation

ALABAMA

City license on itinerant wholesale distributor of groceries held invalid with respect to wholesaler making deliveries in interstate commerce.

In *West Point Wholesale Grocery Company v. City of Opelika,* 87 So. 2d 661, (The Corporation Journal, April—May, 1957, page 334), the Court of Appeals of Alabama held that a city license on itinerant wholesale distributors of groceries applied to a Georgia corporation making deliveries from a point in Georgia to a point in the city of Opelika, Alabama, in interstate commerce. The Supreme Court of Alabama denied a writ of certiorari, as reported at 87 So. 2d 667.

Upon appeal, the Supreme Court of the United States has reversed this judgment, ruling that the city tax could not constitutionally be applied to the appellant corporation and concluding that "the Commerce Clause forbids any such discrimination against the free flow of trade over state boundaries."

*West Point Wholesale Grocery Company v. The City of Opelika,** Supreme Court of the United States, June 17, 1957; Docket No. 478; 77 S. Ct. 1096.

* The full text of this opinion is printed in the **State Tax Reporter,** Alabama, page 3861.

KENTUCKY

Foreign corporation, which leased to others refrigerator cars which passed through state, ruled not subject to state income tax upon income derived from sources within state.

"The principal question in this case," observed the Kentucky Court of Appeals, "is whether Kentucky may levy an income tax on a foreign corporation, admittedly doing no business within the state, but whose refrigerator cars traverse the state in interstate commerce on the lines of connecting carriers of several western railroads which have leased the cars. The foreign corporation receives a specified rate per mile for the use of its cars, and the state has attempted to levy an income tax on the net profits derived by the foreign corporation from the mileage its cars traveled in Kentucky." None of the lessee railroads operated in Kentucky and none of the car leases were executed in that state. The lessor corporation exercised no control over the routing of the cars and mileage payments were not received by it in Kentucky.

The Court of Appeals affirmed a judgment in favor of the corporation which owned and leased the cars to others, concluding that the activities of the lessee railroads and their connecting lines were not legally attributable to the lessor. The court emphasized that it was not the presence of the cars in the state which was the source of that corporation's income, but that the source was the contract or lease, and that neither the instrument nor its owner was located in Kentucky.

*Kentucky Tax Commission et al. v. American Refrigerator Transit Company,** 294 S. W. 2d 554. William S. Riley of Frankfort, for appellants. James W. Stites of Louisville, for appellee.

* The full text of this opinion is printed in the **State Tax Reporter**, Kentucky, page 10,067.

Chain store company, operating two stores each in Kentucky and Tennessee, granted right to employ separate accounting in reporting taxable Kentucky income.

The appellant corporation appealed to the Court of Appeals of Kentucky from a county court ruling which sustained an order of the Tax Commission denying appellant permission to report, by separate accounting, its income attributable to business in Kentucky for two fiscal years. The basis of the denial was that separate accounting, under the facts, was impracticable and did not reflect the true income of the corporation. The court noted that a regulation of the Commission, which implemented the statute, contained a requirement, as a condition of permitting separate accounting, that the taxpayer demonstrate that the statutory formula results in an arbitrary allocation wholly out of accord with actual income earned within the state—a condition which was not stipulated in the statute.

After an examination of the facts, which involved the operation by the taxpayer of four stores, two each in Tennessee and Kentucky, sales of which were recorded separately in the general books in such a way that a net sales figure for each branch could be ascertained, there was no intra-company profit on transfers of merchandise, general purchases of which were made in Tennessee. Although the court did not discuss the question of whether or not the regulation was valid, other than to say it was "of the opinion that the Department had no power to add to or subtract from the standard set by the statute itself," it concluded that the taxpayer should be permitted to report its income in Kentucky on the basis of separate accounting under the facts shown.

Charles C. Parks Company v. Allphin et al., 295 S. W. 2d 562. Elmer Gains Davis, Jr., Smith, Reed & Leary of Frankfort for appellant. Bradford T. Garrison, Department of Revenue, of Frankfort, for appellee.

MINNESOTA

State tax measured by net income on corporations whose business "consists exclusively of foreign commerce, interstate commerce, or both," upheld as to interstate corporation.

"Defendant taxpayer," said the Minnesota Supreme Court in opening its opinion, "a foreign corporation engaged exclusively in interstate commerce, appeals from a judgment in a proceeding by the State of Minnesota to collect income taxes—together with penalties and interest—upon that portion of the taxpayer's total income which is allocable to Minnesota. The allocated tax re-

lates to income derived solely from interstate commerce business conducted in this state."

Defendant Iowa corporation, not licensed as a foreign corporation in Minnesota solicited orders in Minnesota, through an office maintained there, of cement manufactured in Iowa. The flow of the corporation's products into Minnesota constituted about 48% of its sales volume. The court found there were income-producing activities which were separated from the flow of the interstate commerce and had become localized within the state so as to compete with and enjoy the benefits and advantages of a local business, even though these activities were indirectly related to interstate commerce. Through these localized activities, defendant was regarded as receiving extensive benefits of state governmental services and so enjoying the protection of the state courts, which defendant and its predecessor had invoked. The "due process" clause of the Federal Constitution was regarded as satisfied by reason of the localized activities and transactions and the tax imposed on defendant was viewed as not in contravention of the "commerce clause," the tax being considered by the court as nondiscriminatory and fairly apportioned to intrastate net income and not a burden on interstate commerce.

Minnesota v. Northwestern States Portland Cement Co.,* Minnesota Supreme Court, June 14, 1957.

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* The full text of this opinion is printed in the **State Tax Reporter,** Minnesota, page 1720.

TEXAS

Timely payment of franchise tax by check, dishonored in error by bank on which drawn, ruled subject to penalty, where check was subsequently redeposited and paid.

In *Muldrow et al. v. Texas Frozen Foods, Inc.,* 293 S. W. 2d 221, (The Corporation Journal, February—March, 1957, page 314), the Court of Civil Appeals of Texas, Austin, ruled that timely payment of the Texas franchise tax by check, dishonored in error by the bank on which it was drawn, was to be free of penalty, where the check was subsequently redeposited and paid.

Upon appeal, the Supreme Court of Texas has reversed this judgment, and denied the corporation a recover of the amount paid under protest as a penalty for failure to pay the tax on time. The court observed that "if the instrument is dishonored when presented to the bank, it cannot be said that the taxes were paid at the time the check was received." The court, emphasizing that "no official can obligate the State to accept such an instrument as absolute payment of taxes," concluded: "We hold that when a check given for taxes is properly presented and is dishonored for any reason, its subsequent payment operates to discharge the taxes as of the time of such payment and not before."

Muldrow et al. v. Texas Frozen Foods, Inc., 299 S. W. 2d 275. John Ben Shepperd (former) Attorney General, W. V. Geppert, L. P. Lollar, Henry Gates Steen and C. K. Richards, Asst. Attys. General, for petitioners. Kelly, Looney, McLean & Littleton, W. E. Dollahon & Ralph L. Alexander of Edinburgh, for respondent.

WISCONSIN

Interest payments received on tax refunds by a foreign manufacturing company ruled not to be Wisconsin income and not subject to the Wisconsin income tax.

Respondent New Jersey corporation's business in Wisconsin consisted of manufacturing. During the years in question it received interest payments on tax refunds. These interest payments resulted from recomputation of the corporation's income from its Wisconsin operations. The question on appeal to the Supreme Court of Wisconsin was whether these interest payments were income from Wisconsin business and subject to the Wisconsin income tax.

The court thought "it clear that they are not. Interest accrued to respondent not because of or out of the operation of its business, but because the statutes of the state and the United States cause interest to accrue when a taxpayer has paid more than he owes. We do not see that it makes any difference that the adjustments of tax liability which gave rise to the refunds resulted from recomputation of respondent's income from business rather than from investment securities. Both the tax obligations which were overpaid were imposed upon the respondent by reason of its being a person or corporate entity. Neither was a tax on particular property nor upon transactions identified with a particular property or business." The court concluded that because these interest payments were not income from the business, they fell, under the statute, into the class of income which follows the residence of the respondent, which was outside of Wisconsin. Therefore, they were required to be deducted from the total net income before applying the apportionment formula.

Wisconsin Department of Taxation v. Aluminum Goods Mfg. Co.,* 82 N. W. 2d 349. Stewart G. Honeck, Atty. Gen., Harold H. Persons, Asst. Atty. Gen., for appellant. Fairchild, Foley & Sammond, Theodore C. Bollinger of Milwaukee, for respondent.

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* The full text of this opinion is printed in the **State Tax Reporter**, Wisconsin, page 11,549.

state legislation

Maine— Chapter 77, Laws of 1957, provides that a corporation may be dissolved without having paid retail sales taxes if the Assessor finds and certifies that there are no funds from which payment can be made.

New Mexico— Chapter 132 requires domestic corporations to hold their first meeting of stockholders for election of officers and directors within three months after filing their articles of incorporation.

South Carolina— Act 226 permits domestic corporations to merge or consolidate with foreign corporations, the survivor to be either a domestic or a foreign corporation.

Utah— Senate Bill 222 enables foreign corporations to acquire debts secured by mortgages or liens on real or personal property in Utah and to protect their rights and interests in such debts and the security therefor without being considered to be doing business in Utah.

Washington— Chapter 139 provides that any unlicensed foreign corporation, bank, trust company, mutual savings bank, etc., may purchase, acquire, hold, sell, assign, transfer and enforce notes secured by real estate mortgages on property situated in Washington. The corporation may foreclose such mortgages or receive voluntary conveyance in lieu of foreclosure, and in the course of such proceedings may acquire the mortgaged property, and may hold and own such property for a period not exceeding 5 years, and dispose thereof. In the event such corporation holds, owns and operates such property for a period in excess of 5 years, it must designate an agent as is required by all foreign corporations. Such activities do not constitute conducting business such as to require qualification or payment of annual license fees. The Secretary of State is the agent of such corporation upon whom process may be served in any action on the notes secured by such real estate mortgages.

Chapter 198 doubles the rates of fees payable upon incorporation, qualification and upon increase in capital, and also doubles the rates of the fees payable as the annual license fee by domestic and foreign corporations.

West Virginia— Senate Bill 179 provides that any unqualified foreign corporation doing business in the state is conclusively presumed to have designated the State Auditor as its attorney in fact for receipt of service of process. For the purpose of this act, an unqualified corporation is deemed to be "doing business" in West Virginia if it makes a contract to be performed in whole or in part in the state or if it commits a tort in whole or in part within the state.

Senate Bill 251 directs that an amendment to the West Virginia Constitution be submitted to the voters at general election to be held in 1958. The amendment would permit all corporations other than a banking institution to issue one or more classes or series of stock with full, limited or no voting rights.

appealed to the supreme court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.*

ALABAMA. Docket No 478. *West Point Wholesale Grocery Co. v. City of Opelika*, 87 So. 2d 661, 667. (The Corporation Journal, April—May, 1956, page 334.) City license tax upon itinerant or transient wholesale grocers—validity. **Appeal filed, October 4, 1956. Jurisdiction noted, December 3, 1956. (77 S. Ct. 225.) Argued, April 24, 1957. Reversed, June 17, 1957; see page 13. (77 S. Ct. 1096.)**

MICHIGAN. Docket No. 487. *United States et al. v. City of Detroit*, 77 N. W. 2d 79. (The Corporation Journal, February—March, 1957, page 312.) Property tax on lessee of property leased by Federal government. **Appeal filed, October 8, 1956. Probable jurisdiction noted, January 14, 1957. (77 S. Ct. 353.)**

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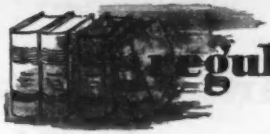
* Data compiled from **CCH U. S. Supreme Court Bulletin, 1956—1957.**



Regulations and rulings

Alabama — A taxpayer, as a consumer, is allowed to deduct the Alabama sales tax when computing his net income subject to the state income tax, the sales tax law showing that the sales tax is a consumer's tax and, as such, it is deductible under Section 385 of the income tax law. (Opinion of the Attorney General, State Tax Reporter, Alabama, ¶ 14-009.)

Louisiana — In a transaction involving a foreign manufacturer not authorized to do business in Louisiana, the manufacturer's New York supplier who is authorized to collect the Louisiana use tax and a Louisiana customer who orders a machine part through the manufacturer and receives the part directly from the supplier, the Louisiana user would be liable for reporting and paying the use tax if it is not collected by one of the other parties. The supplier is under no obligation to collect the tax since he did not make the sale to the purchaser. If the manufacturer is not engaged in business in Louisiana under the terms of Section 301 (4) (h) of Title 47, he is under no obligation to collect the tax. (Letter, Chief of Sales Tax Division, Department of Revenue, State Tax Reporter, Louisiana, ¶ 200-120.)

Mississippi — A manufacturer is not exempt from the payment of the 14% income tax surtax on income derived in part from nonmanufacturing sources. A steel company whose income is derived from the manufacture of building parts of fabricated steel is exempt from payment of the surtax. The income derived by the company from the erection of the steel products, however, is not tax exempt as the law provides that manufacturing does not include construction, repair or reconditioning of building. (Memorandum from Chief of Income Tax Division, State Tax Reporter, Mississippi, ¶ 200-066.)

Missouri — A county assessor may use as a basis for assessing property for the current year, the valuation fixed and determined for the preceding year if the valuation reflects the true valuation for tax purposes. The assessor is required to notify, either in person or by mail, the owner of real estate which is by the action of the assessor assessed at a higher value than the value returned in the taxpayer's list. (Opinion of the Attorney General, State Tax Reporter, Missouri, ¶ 200-178.)

Nebraska — Goods shipped from within or without the state to a warehouse in Nebraska under an "intransit" arrangement and later sold and delivered to a buyer in another state are not a part of interstate commerce and exempt from taxation in Nebraska. (Opinion of the Attorney General, State Tax Reporter, Nebraska, ¶ 24-569.)

North Carolina — A foreign corporation which manufactures food products in another state and whose orders in North Carolina are handled by general brokers, not employees, is doing business if some items on which quick deliveries are needed are shipped to a public warehouse in North Carolina and from there shipped by public truck to the purchaser. (Opinion of the Attorney General, State Tax Reporter, North Carolina, ¶ 200-090.)

some important matters

For August and September

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

Arkansas — Annual Franchise Tax due on or before August 10.—Domestic and Foreign Corporations.

California — Franchise Tax based on net income. Second installment due on or before September 15.—Domestic and Foreign Corporations.

Connecticut — Annual Report due on or before August 15 (if corporation was organized or qualified between July 1 and December 31 of any previous year).—Domestic and Foreign Corporations.

Idaho — Annual Statement and Annual License Tax due between July 1 and September 1.—Domestic and Foreign Corporations.

Kentucky — Report of Unclaimed Dividends, etc., due on or before September 1.—Domestic and Foreign Corporations.

Louisiana — Franchise Tax Report and Tax due on or before October 1.—Domestic and Foreign Corporations.

Maine — Annual Franchise Tax due September 1; delinquent one month later.—Domestic Corporations.

Oklahoma — Annual Franchise Tax Report and Tax due on or before August 31.—Domestic and Foreign Corporations.

Oregon — Annual License Fee due August 15.—Domestic Corporations.

Annual License Fee due August 15.—Foreign Corporations.

Report of Abondoned Property due on or before September 1.—Domestic and Foreign Corporations.

Quebec — Annual Return to Provincial Secretary due on or before September 1.—Domestic and Foreign Corporations.

Wisconsin — Second Installment of Income Tax due on or before August 1.—Domestic and Foreign Corporations.

supplementary literature

In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York 5, N. Y.

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